Supreme Court, U.S.
FILED
SEP 21 1993
OFFICE OF THE CLERK

No. 93-125

In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL F. RENNEISEN, ET AL., PETITIONERS

v.

AMERICAN AIRLINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR AMERICAN AIRLINES, INC. IN OPPOSITION

HARRY A. RISSETTO *
GREGORY S. LEWIS
NEAL D. MOLLEN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Counsel for Respondent American Airlines, Inc.
* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, as part of a 1983 collective bargaining agreement with its pilots' union, American Airlines violated Section 2 of the Railway Labor Act by agreeing to job security and minimum pay guarantees for all pilots then employed by American as a *quid pro quo* for substantial mid-contract wage and benefit concessions by the pilot group?

STATEMENT UNDER RULE 29.1

Respondent American Airlines, Inc., is a wholly-owned subsidiary of AMR Corporation, a publicly traded Delaware corporation headquartered in Texas. American Airlines has no non-wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT UNDER RULE 29.1	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Facts	2
1. American and the Industry in 1983	2
2. American's Response to Stagnation	3
3. Mid-Term Negotiations With APA	4
4. Supplement B and the *Quid Pro Quo*	5
5. Subsequent Reduction and Elimination of B-Scale Differentials	6
6. Aftermath of Supplement B	7
B. Decisions Below	7
ARGUMENT	9
I. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS	10
II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH BASIC PRINCIPLES OF LABOR LAW	13
A. American and the APA Lawfully Agreed to a Ratification Procedure Carefully Tailored to the Exigencies Facing the Parties	13

TABLE OF CONTENTS—Continued

Page

B. Supplement B Does Not Violate Section 2 Fourth of the Railway Labor Act Because It Does Not Constitute a "Fundamental Blow" to Collective Bargaining 16

III. PETITIONER'S THEORY WOULD ELIMINATE JOB SECURITY GUARANTEES AS A SUBJECT OF COLLECTIVE BARGAINING.... 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases Page

Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65 (1991) 12
Allis-Chalmers Mfg. Co. v. NLRB, 213 F.2d 374 (7th Cir. 1954) 16
Armistead v. Vermitron Corp., 944 F.2d 1287 (6th Cir. 1991) 13
Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984) 13
Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) 14
Freedom WLNE-TV, Inc., 278 N.L.R.B. 1293 (1986) 16
Grace & Hornbrook Mfg. Co., 225 N.L.R.B. 15 (1976) 16
Hertz Corp., 304 N.L.R.B. 469 (1991) 16
H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) 18
Houchens Market of Elizabethtown, Inc. v. NLRB, 375 F.2d 208 (6th Cir. 1987) 16
Humphrey v. Moore, 375 U.S. 335 (1963) 18
J.I. Case v. NLRB, 321 U.S. 332 (1944) 14
Keffer v. H.K. Porter Co., 872 F.2d 60 (4th Cir. 1989) 13, 18
Medo Corp. v. NLRB, 321 U.S. 678 (1944) 14
NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) 11, 15, 16
NLRB v. Darlington Veneer Co., 236 F.2d 85 (4th Cir. 1956) 16
Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 14
Reichhold Chem., Inc. v. NLRB, 953 F.2d 594 (11th Cir. 1992) 10, 11, 12
Seaboard World Airlines v. TWU, 425 F.2d 1086 (2d Cir. 1970) 10, 12
Seaboard World Airlines v. TWU, 443 F.2d 437 (2d Cir. 1971) 12, 13
Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) 18
Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1053 (1991) 10, 11, 12

TABLE OF AUTHORITIES—Continued

Page

Trans World Airlines v. Independent Fed'n of Flight Attendants, 489 U.S. 426 (1989) 10, 16, 17, 18
United Mine Workers of Am. 1974 Pension Trust v. The Pittston Co., 984 F.2d 469 (D.C. Cir.), *cert. denied*, 113 S. Ct. 3039 (1993) 13
United Steelworkers v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989) 13
Westinghouse Air Brake Co., 123 N.L.R.B. 859 (1959) 14
Wilford Auto Sales, Inc., 106 N.L.R.B. 1396 (1953) 14
Williamhouse-Regency of Delaware, Inc., 297 N.L.R.B. 199 (1989), *enf'd*, 915 F.2d 631 (11th Cir. 1990) 16
Zayre Dep't Stores, 289 N.L.R.B. 1183 (1988) 16

Statutes

28 U.S.C. § 1254(1) 2
National Labor Relations Act, 29 U.S.C. § 158(d) .. 11
Railway Labor Act
45 U.S.C. § 151a 11
45 U.S.C. § 152 .....*passim*
45 U.S.C. § 156 11
Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 7
Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 7

Rules

Fed. R. Civ. P. 12(b) (6) 8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-125

PAUL F. RENNEISEN, ET AL., PETITIONERS

v.

AMERICAN AIRLINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR AMERICAN AIRLINES, INC. IN OPPOSITION

Respondent American Airlines, Inc., respectfully submits this brief in opposition to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 990 F.2d 918. The opinion of the district court (Pet. App. 18a-34a) is not reported but is available at 1991 U.S. Dist LEXIS 18415. The report and recommendation of the magistrate judge (Pet. App. 36a-48a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 24, 1993. A petition for rehearing was denied

on April 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of Section 2 of the Railway Labor Act, 45 U.S.C. § 152, are reproduced in the petition at pp. 2-3.

STATEMENT OF THE CASE

Petitioners' discussion of the facts of this case consists of two paragraphs and an excerpt of Supplement B, the contract provision at issue. (Pet. 3-5). That brevity is no accident. Because the facts do much to undermine their legal theory, petitioners' statement fails to disclose much of the relevant factual background, which was uncontested and adopted by the courts below. To place the present petition in the proper context, American supplements petitioners' statement as follows:

A. Facts

1. *American and the Industry in 1983*

In 1983, American Airlines ("American" or "the Carrier") was at a financial and operational crossroads. Deregulation of the airline industry in 1978 had resulted in the appearance of a number of new, low-cost carriers. This new competition substantially affected American's operations. From 1979 to 1983, American's aircraft fleet shrank by more than 10%. American hired no new pilots during that period; indeed, by October 1983, just before the agreement at issue in this case was signed, approximately 457 pilots (more than 10% of the pilot group) were on furlough. Simultaneously, the Carrier faced increasing fuel costs—a serious problem for American because of its aging fleet of fuel-inefficient aircraft.

American's future looked equally bleak. In 1983, it operated 238 aircraft. American's forecasts projected that,

by 1988, its fleet would consist of 250 aircraft, reflecting an annual growth rate of only one percent per year. The prospects for recalling furloughed pilots and hiring additional pilots were similarly limited.

2. *American's Response to Stagnation*

Facing stagnant growth and the further loss of market share to the new low-cost carriers, American concluded that it could compete and grow only if it achieved a significant reduction in average unit labor costs. The costs of fuel and aircraft were essentially uncontrollable, and basically the same for American as for the low-cost carriers. Consequently, the primary cost differential between American and the low-cost carriers was in labor costs. American's labor costs at the time were approximately 35% of its total costs. Labor costs for the non-union start-ups (and for Continental Airlines after it declared bankruptcy in September 1983, and slashed its wage rates) ranged between 20% and 25% of total costs.

In 1981 and 1982, responding to these conditions, many of the other established U.S. air carriers negotiated temporary wage reduction agreements with their unions. American, however, did not believe that its unions would agree to wage reductions, nor did it believe that temporary reductions would solve the problem of generating and sustaining long-term growth.

Accordingly, American developed a proposal that involved no wage or benefit reductions for current employees. Instead, the proposal coupled pay and job security guarantees for incumbents with "market" rates of pay for new hires, *i.e.*, rates at or near those paid by the low-cost carriers. This plan was consistent with American's company-wide program of hiring at market rates, which the Carrier was implementing with its non-union employees and was negotiating with its other unions. The plan was designed to permit American to compete and expand with marginal labor costs at or near market rates,

and to reduce average unit labor costs sufficiently to permit long-term capital investment and ensure continued growth.

American first made its "two-tier" proposal during contract negotiations with the Transport Workers Union, the bargaining representative for American's mechanics and fleet service personnel. Agreement was reached in February 1983. In November 1983, American reached a similar "two-tier" agreement with the Association of Professional Flight Attendants.

3. *Mid-Term Negotiations With APA*

American and the Allied Pilots Association ("APA") were, at the time, parties to a collective bargaining agreement not due for renegotiation until 1984. Nevertheless, in March 1983, American asked the APA to enter into mid-contract negotiations to give American relief in average cockpit labor costs. American told the APA that the only alternative to such mid-term relief would be later wage cuts or a reduction in fleet size.

During the negotiations that eventually ensued, the APA ultimately agreed that growth would require a reduction in average unit labor costs, and that growth would inure to the benefit of all pilots, including pilots subsequently hired. Indeed, it was anticipated that these to-be-hired pilots would be the principal beneficiaries of the expansion plan; they would obtain jobs and rapid promotional opportunities that would not have existed otherwise. More fundamentally, the parties believed that growth would solidify American's ability to survive and prosper. This would promote job stability for all American employees in an industry that was facing an extended period of turmoil and instability.

Given the choice of wage cuts or a two-tier pay structure, APA negotiators preferred the two-tier option because it protected the jobs and pay levels of the employees who had directly participated in establishing

American as a major market force, while providing additional employment opportunities to new pilots at wage levels competitive with or more generous than those offered by the new market entrants.

The APA negotiators recognized, however, that American's growth would eventually make the incumbent pilots a minority in the APA.[1] The non-incumbent majority might then be willing to trade away the incumbents' job guarantees in return for improvements in their own pay and benefits. Accordingly, the APA negotiators insisted on iron-clad language to ensure that the APA and American could not modify or eviscerate the promises American had made to the incumbents unless the modifications were ratified by a majority of the incumbent group.[2]

4. *Supplement B and the Quid Pro Quo*

After intensive negotiations, American and the APA reached agreement on November 4, 1983. The Agreement provided that American's incumbent pilots would forego a seven percent wage increase scheduled for November 1983, and accept a reduction in the rate of vacation accruals. The Agreement also established a two-tier wage structure under which pilots hired thereafter would be paid at proportionately lower (so-called "B-scale") rates and pension benefits throughout their careers with American.

In exchange for these concessions, American committed to an extraordinary expansion of its aircraft fleet. Specifically, American agreed to acquire over 200 additional aircraft within five years, nearly doubling its fleet.

---

[1] As of January 1, 1991, 5,254 of American's 8,877 pilots, 59% of the total, had been hired since 1983.

[2] The proposal was APA's. Petitioners' intimation that *American* sought this special ratification procedure in order to create "discord" within the pilot group is wrong and finds no support in the record.

American also agreed to recall all furloughed pilots. Finally, American agreed to a series of protections for the incumbent (or "A-scale") pilots. These were embodied in Supplement B of the collective bargaining agreement.

Supplement B guaranteed lifetime job security for the incumbent pilots, and further guaranteed that their pay and retirement benefits would never fall below the then-current (1983) levels. Supplement B specified that American and the union would not alter those guarantees unless a majority of the then-active A-scale pilots agreed to the change. The Agreement permitted American and APA to reduce the pay and benefit differentials between the B-scale and the A-scale pilots, even down to a single penny, but not to "totally eliminate" them. Nothing in Supplement B prevented the APA from seeking similar—even identical—job and benefit protections on behalf of the B-scale pilots in subsequent bargaining.

5. *Subsequent Reduction and Elimination of B-Scale Differentials*

During negotiations in 1985, 1986, 1987 and 1991, the APA and American successively reduced and ultimately eliminated the A-scale and B-scale differentials. The separate A- and B-scales were merged into a single, seniority-based wage scale applicable to all pilots, regardless of date of hire. This is the same kind of scale traditionally used at American and in the industry generally.[3] Similarly, the APA and American have eliminated all existing distinctions between pre- and post-1983 pilots in benefits. The only remaining effect of the 1983 Agreement is that the pay differentials separating the first few steps on the current wage scale are greater than on the pre-1983 scale.

---

[3] Thus, while the colloquial terms "A-scale" and "B-scale" are still sometimes used to denote pilots hired before the November 1983 agreement ("pre-1983" pilots) and thereafter ("post-1983" pilots), respectively, those terms are no longer literally accurate; there is now only one wage scale.

6. *Aftermath of Supplement B*

The benefits of the November 4, 1983 Agreement to American, to the APA, *and most particularly to the post-1983 pilots*, have been remarkable. After concluding that agreement, American embarked upon an expansion plan that has made it the nation's largest airline. In five years, American more than doubled its fleet and pilot work force. It is evident that many, if not all, of American's post-1983 pilots owe their current employment to the growth in American's operations that resulted from the November 4, 1983 Agreement. As the district court stated: "Indeed, it is not far-fetched to state that without [that agreement] there would be no post-1983 pilots, let alone an American Airlines." Pet. App. 33a.

B. Decisions Below

Against this background, a disgruntled group of American's post-1983 pilots brought this action in the United States District Court for the Northern District of Illinois. Seeking certification as representatives of a purported class composed of all post-1983 pilots, they alleged that Supplement B constituted an illegal waiver of their right to bargain; that it destroyed the union's community of interest to such an extent that American could dominate or control the APA; that American had refused to bargain in good faith by insisting on retaining Supplement B; that Supplement B was an illegal restraint of trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; and that Supplement B discriminated between pre- and post-1983 pilots in violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. (Pet. App. 22a-23a).

After petitioners abandoned their ERISA claim, the district court dismissed the Railway Labor Act ("RLA") claims for lack of subject matter jurisdiction, holding that Supplement B did not constitute the type of "fundamental blow" to collective bargaining necessary to support a

claim under Section 2 of the RLA. Because petitioners conceded that there could be no antitrust violation if Supplement B was legal under the RLA, the court also dismissed the antitrust claim. (Pet. 33a-34a).

The court of appeals affirmed the dismissal, but not for lack of jurisdiction. The court held that the Complaint failed to state a claim under Fed. R. Civ. P. 12(b)(6), based both on the district court's substantive analysis and the fact that Section 2 of the RLA does not give minority groups in a union a cause of action against their employer for adhering to agreements that the union decides not to challenge. (Pet. App. 2a-3a, 11a-17a). The court stated:

> We see nothing sinister and nothing contrary to the RLA or federal labor policy in an agreement that permanently gives benefits to a shrinking percentage of a union's membership. Plaintiff's efforts to compare locked-in benefits to a permanent waiver of the right to bargain in the first instance borders on outrageous. Many union agreements allocate superior benefits to certain groups of workers. The added wrinkle in plaintiff's case is temporal: the guarantees are permanent. From the perspective of the union in 1983, however, permanent guarantees for the 1983 pilots were far preferable to negotiable guarantees. Plaintiffs now seek to blame American for their union's success ten years ago.

(Pet. App. 15a).

ARGUMENT

Having reaped the rewards of the job expansion secured by Supplement B, petitioners now attack the agreement because it precludes the APA from trading away the job security and compensation guarantees of the pre-1983 pilots in exchange for higher wages for petitioners without the consent of the majority of the pre-1983 pilots. The lower courts properly rejected that challenge, and further review in this case is not warranted. The decisions below were grounded in settled principles of federal labor law, and the conclusions reached by the magistrate judge, the district court and the unanimous panel of the court of appeals evince a common-sense and unexceptional application of these principles.

The petition presents no special or important reason for further review. Contrary to petitioners' claims, this case presents no conflict with any other court of appeals decision. Petitioners attempt to manufacture such a conflict based on three cases. In fact, each of those cases *supports* the decision of the court of appeals in this case. Two of them support the proposition that Supplement B was a "permissive" subject of bargaining and, upon agreement, became a lawful, enforceable contract. The third case rejected a challenge to a collective bargaining agreement providing *permanent* job guarantees and other benefits.

Nor does the decision below reflect a departure from this Court's precedents or from general principles of federal labor law. To the contrary, the decision is fully consistent both with the teachings of this Court and a long line of lower court cases:

(1) Petitioners repeatedly assert that Supplement B's ratification procedure strips the APA of its status as the exclusive bargaining representative of American's pilots and provides for unlawful "tripartite" bargaining. Decisions by this Court and the lower courts, however, have

consistently affirmed that special ratification rights for sub-groups of employees are permissible subjects of bargaining and agreement between unions and employers.

(2) Petitioners insist that Supplement B is unlawful because it inevitably will create dissension within the bargaining unit. This Court has expressly rejected the same "divide and conquer" theory in a recent case against another airline, *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

Finally, review by this Court is unwarranted because the parade of horribles envisioned by petitioners is built not upon a live controversy, but upon a series of speculations and hypotheticals. Supplement B, we are told, is unlawful because (i) either American or APA may, at some point in the future, propose reductions in pay or retirement benefits for pre-1983 pilots; (ii) the proposed reductions may reduce these pay or retirement benefits *below 1983 levels*, thus requiring the modification or elimination of Supplement B's guarantees; (iii) the non-proposing party might agree; and (iv) the majority of pre-1983 pilots might not vote to ratify the contract embodying the modifications. Petitioners cannot point to even a remotely similar occurrence in the ten years since Supplement B was signed, or to the likelihood of any such scenario occurring in the future. This Court's scarce resources are best spent resolving live—not hypothetical —controversies.

I. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS.

Petitioners assert that three cases conflict with the decision below: *Reichhold Chem., Inc. v. NLRB*, 953 F.2d 594 (11th Cir. 1992); *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1053 (1991); and *Seaboard World Airlines v. Transport Workers Union*, 425 F.2d 1086 (2d Cir. 1970). In fact, all three cases directly support the decision below.

In *Reichhold*, the employer insisted in bargaining with its union that it be permitted to negotiate directly with its employees over certain job security agreements. In *Toledo Typographical*, the employer insisted that the union bargain over the scope of the underlying collective bargaining unit. In each case, the court held that the employer committed an unfair labor practice by conditioning agreement on, or "bargaining to impasse over," a lawful but non-mandatory subject of bargaining. Petitioners cite these cases as "strongly suggesting" that agreements permitting employers to bypass a union and deal directly with employees are unlawful where they would have a divisive impact on the cohesiveness of the bargaining unit, rendering concerted action more difficult. Pet. 16-18. In fact, they stand for the contrary proposition: such clauses are lawful if the union agrees to them.

To begin with, the cases are inapposite because nothing in Supplement B permits or even contemplates that American could bypass the APA and deal directly with the pre-1983 pilots. Even if it did, however, as made amply clear in *Reichhold* and *Toledo Typographical*, the clause would be lawful because APA agreed to it. Those cases merely illustrate the distinction between so-called "permissive" and "mandatory" subjects of bargaining. Under the National Labor Relations Act ("NLRA"), employers and unions are statutorily obligated to bargain over "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d).[4] Bargaining parties may bargain to impasse on such subjects. With respect to non-mandatory or permissive matters, however, either party is free to bargain or not to bargain, and to agree or not to agree. *Reichhold Chem.*, 953 F.2d at 595, *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) ("Borg-Warner"). Consistent with these

[4] The analogous provision under the Railway Labor Act addresses "rates of pay, rules, or working conditions." 45 U.S.C. §§ 151a, 152 First, 156.

principles, in both *Reichhold* and *Toledo Typographical* the employers were held to have committed an unfair labor practice, *not* because their bargaining proposals were unlawful, but because the proposals concerned "permissive" subjects of bargaining and the employers impermissibly bargained to impasse over them.

By contrast, APA *did* negotiate, and an agreement *was* reached. No case cited by petitioners—and none known to respondent—would require, or even permit, the federal courts to reassess the wisdom of this consensual bargain.[5] Petitioners admit as much by insisting that "it is simply not the prerogative of the federal judiciary to determine for the bargaining representative the relative worth of its bargaining positions or the effectiveness of its negotiating strategy." Pet. 10 n.5. American wholeheartedly agrees, and this answers the petition rather succinctly.

Nor is *Seaboard World Airlines v. TWU*, 425 F.2d 1086 (2d Cir. 1970), in conflict with the decision below. *Seaboard* involved a "supplemental security agreement" between the airline and its navigators. It provided job guarantees and fixed the terms and conditions of employment *permanently*.[6] In its two opinions, at 425 F.2d 1086 (2d Cir. 1970) and 443 F.2d 437 (2d Cir. 1971), the Second Circuit held that the permanent arrangement was lawful and enforceable under the RLA. Petitioners'

---

[5] There are limited circumstances, of course, when judicial scrutiny of the substance of collective bargaining is warranted, for example, when the union breaches its duty to represent fairly all of the members of the unit. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991). As the court of appeals aptly noted, however, even assuming the facts supported such a claim, this is not a duty of fair representation case, and the union has never been a party to this lawsuit.

[6] All terms of employment were permanently fixed except for wages, which could be renegotiated once after a period of 10 years. 425 F.2d at 1087-88.

suggestion, Pet. 18, that the court enforced the arrangement only because it "could be altered by the written consent of the parties," is false; the subject was not mentioned as a basis for either of the court's opinions. Indeed, in its second opinion (which petitioners fail even to cite), the court expressly rejected the union's challenge to the permanency of the arrangement as "requiring little comment." 443 F.2d at 439.[7]

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH BASIC PRINCIPLES OF LABOR LAW.

A. American and the APA Lawfully Agreed to a Ratification Procedure Carefully Tailored to the Exigencies Facing the Parties.

The petition's central theme is the claim that Supplement B creates a "tripartite" bargaining structure that strips the APA of its status as the exclusive bargaining representative of all of American's pilots. Pet. at 8, 16. That proposition has no record support and is wrong as a matter of historical fact: American does not negotiate and has never negotiated with any pre-1983 pilot or group of pilots. The Carrier has bargained *exclusively* with the APA on *all* matters related to the rates of pay, rules, and working conditions of *all* of its pilots.

Moreover, as noted by the courts below, Supplement B does nothing to restrict in any meaningful way the APA's freedom to bargain on behalf of the entire pilot group or any subgroup. APA is even free to propose job and

[7] Decisions under the NLRA similarly uphold the validity of collective bargaining agreements of extended or permanent duration. *See United Mine Workers of Am. 1974 Pension Trust v. The Pittston Co.*, 984 F.2d 469 (D.C. Cir), *cert. denied*, 113 S. Ct. 3039 (1993); *Armistead v. Vermitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984).

benefit guarantees for post-1983 pilots *identical* to those achieved by the union in 1983 for all pilots then on the seniority list. Pet. App. 14a, 29a-30a, 42a-43a.[8] Supplement B simply does not provide for "tripartite bargaining" and there is no basis for petitioners' insistence that it does. Although the pre-1983 pilots are given a special voice in the ratification process in the event of contemplated changes to the Supplement's guarantees—guarantees for which those pilots paid by forfeiting wages and benefits due them in 1983—there is *no* evidence to support petitioner's contention that actual *bargaining* with the pre-1983 pilots, or any sub-group of them, is required or even permitted by the contract's terms.[9]

---

[8] Petitioners assert that "all concessionary bargaining must occur solely at the expense of the [post-1983] pilots, or with the express agreement of a majority of the [pre-1983] pilots." Pet. 9. That assertion is wrong: Supplement B guarantees the pay and pension benefits of the pre-1983 pilots at *1983* levels. Nothing in Supplement B precludes concessionary bargaining over the entire spectrum of other topics, even below 1983 levels, or over wages and pension benefits down as far as 1983 levels.

[9] For this reason, the petitioners' reliance on cases such as *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *J.I. Case v. NLRB*, 321 U.S. 332 (1944); *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944); and *Medo Corp. v. NLRB*, 321 U.S. 678 (1944), is misdirected. In those cases, the employer (or the employees) circumvented a certified bargaining representative to negotiate deals directly between employer and employee. The cases involved actual negotiations—collective bargaining—and *not* procedures for contract ratification. Here, there have not been any such negotiations, nor will there be under Supplement B.

Petitioners similarly mis-cite two National Labor Relations Board ("NLRB") decisions, *Westinghouse Air Brake Co.*, 123 N.L.R.B. 859 (1959) and *Wilford Auto Sales, Inc.*, 106 N.L.R.B. 1396 (1953). Those cases stand for the unchallenged but inapposite proposition that a union and employer may not bargain away an NLRB certification by agreeing that the union need not represent employees the Board has certified it to represent. The cases are meaningless in the present context because, as explained above, APA has represented, is representing, and will continue in the future to represent

It is not surprising that petitioners attempt to blur the distinction between so-called "tripartite" bargaining and collectively bargained *ratification* procedures. This Court spoke with some degree of specificity on the latter topic in *Borg-Warner*, 356 U.S. at 350 (1958), and petitioners' argument cannot be reconciled with the holding of that case. In *Borg-Warner* the employer bargained to impasse on a "ballot clause" that would have required a ratification vote on the employer's final contract offer *prior* to any strike by the union. More importantly, the employer insisted that *all* of its employees, union and non-union alike, be permitted to vote in the ratification process. In essence, the employer insisted that employees *outside* of the collective bargaining unit be allowed to determine the terms and conditions of employment for those *inside* the unit. As such, the Court recognized that the ratification provision could "substantially modif[y] the collective bargaining system . . . by weakening the independence of the 'representative' chosen by the [unionized] employees . . . ." The Court concluded, however, that the proposal was a *permissible* topic of bargaining, not an unlawful one. Consequently, the employer was entitled to make the proposal and, if an agreement had been reached, the resulting contract would have been fully enforceable. *Id.* at 349.

Under this standard, Supplement B is plainly lawful. The ballot clause at issue in *Borg-Warner* would have given the power of ratification to employees outside of the collective bargaining unit—to employees with only an attenuated interest in the terms of the agreement. Supplement B does precisely the reverse, giving a special voice to employees uniquely affected by the terms submitted for ratification. If, as this Court held, the former provision is a lawful basis for reaching a collective agreement, unquestionably the latter is as well.

---

all of American's pilots, unless the pilot group chooses otherwise. The parties have never "bargained away" any representation duty.

Given the clarity of this Court's guidance in *Borg-Warner*, it is not surprising that petitioners have been unable to cite a single case or NLRB opinion condemning a consensual agreement on voting or ratification procedures reached in arms-length bargaining between management and labor. Rather, the decisions of the courts of appeals [10] and the NLRB [11] uniformly classify such provisions as permissible, lawful topics of bargaining.

B. Supplement B Does Not Violate Section 2 Fourth of the Railway Labor Act Because It Does Not Constitute a "Fundamental Blow" To Collective Bargaining.

Petitioners insist that Supplement B violates Section 2 Fourth of the RLA because it results in a "lack of cohesion" within the unit. Pet. 15. This, they claim, strikes a "fundamental blow . . . to the collective bargaining process itself" and so violates Section 2 Fourth, referring to the standard established by this Court in *Trans World Airlines*, 489 U.S. at 442. Here too, however, petitioners have failed to cite a single case condemning an arms-length, collectively bargained agreement for this reason.[12]

---

[10] *See, e.g., Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208 (6th Cir. 1987) (proposal on voting procedures is permissive, not illegal topic); *Allis-Chalmers Mfg. Co. v. NLRB*, 213 F.2d 374 (7th Cir. 1954) (same); *NLRB v. Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956) (same).

[11] *Hertz Corp.*, 304 N.L.R.B. 469 (1991); *Williamhouse-Regency of Delaware, Inc.*, 297 N.L.R.B. 199 (1989), *enf'd*, 915 F.2d 631 (11th Cir. 1990); *Zayre Dept. Stores*, 289 N.L.R.B. 1183 (1988); *Freedom WLNE-TV, Inc.*, 278 N.L.R.B. 1293 (1986); *Grace & Hornbrook Mfg. Co.*, 225 N.L.R.B. 15 (1976).

[12] Petitioners attach an Affidavit by Professor Clyde Summers, who argues that arrangements like Supplement B, "mak[e it] more difficult [to arrive at] collective agreements which are acceptable to most or a majority of the members." Pet. App. 67a. Supplement B, Summers concludes, has been counterproductive for the APA, just as similar agreements have been counterproductive for "the Auto Workers, the Printers Union, the Musicians

In fact, this Court dismissed a similar "divide and conquer" theory in *Trans World Airlines, supra.* In that case the carrier had unilaterally given preferential treatment at the close of a strike to so-called "cross-over" strikers, *i.e.*, strikers who decided to stop striking and return to work before the strike had ended. The union argued that such favorable treatment would "cleave" the employee group into identifiable classes, with consequences for union cohesiveness that would linger "long after the strike [had] ended" and inevitably hamper the union in future concerted activities. "Resentful rifts among employees," the union argued, "will . . . persist . . . because TWA's [policy] 'set up a competition *among* [the union's members] and thereby undermined the group's ability to take the collective action that it is the very purpose of the [RLA] to protect.'" 489 U.S. at 436 (citation omitted; emphasis in original).

In rejecting the union's claim, this Court began by noting that the 1934 amendments to the RLA (of which Section 2 Fourth was a part) were aimed principally at the *pre-certification* conduct of employers, *i.e.*, at employer efforts to chill union organizing activities. *Id.* at 440-41. Section 2 Fourth therefore has only limited post-certification applicability: only employer conduct that constitutes a fundamental blow to union activity or a direct attack on the collective bargaining process itself could constitute a violation of the provision. *Id.* at 442. Addressing the union's "divide and conquer" theory directly, the Court held that TWA's actions in fostering the alleged schism within the craft failed to constitute *either* a fundamental blow to union activity *or* a direct attack on the collective bargaining process.

Union and various construction unions." *Id.* Summers' Affidavit proves only that Supplement B is not, as petitioners suggest, unprecedented. Although Summers apparently believes those similar arrangements are undesirable, he does not suggest that they are unlawful. Similarly, he nowhere opines that *Supplement B* is unlawful, merely that it has "outlived its usefulness." *Id.* at 69a.

In this case, petitioners do not attack *unilateral* employer conduct, but a collectively bargained response to difficult financial circumstances. If petitioners are to be believed, that response could have an impact at American similar to the impact of the cross-over policy at TWA. Petitioners have not suggested, however, why the product of intense, arms-length collective bargaining by American and the APA should receive *less* deference from this Court in this case than TWA's unilateral actions in *Trans World Airlines*. *See Humphrey v. Moore*, 375 U.S. 335, 349 (1963) ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."), *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

Federal labor policy encourages labor and management to resolve at the bargaining table the challenges that confront them, and accords them wide latitude so that they can accomplish that goal without the constant fear of judicial second-guessing. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In particular, bargaining parties are not prohibited by the RLA "from making contracts which may have unfavorable effects on some members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority . . . are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944).[13]

---

[13] Petitioners argue that American's vigorous defense of Supplement B can only be explained by a desire to impose a divisive bargaining structure on the APA. Pet. 10 n.5. This argument ignores the fact that the Complaint in this action sought hundreds of millions of dollars in back wages and antitrust damages. American's decision to defend against that claim cannot reasonably be ascribed to a sinister bargaining agenda.

III. PETITIONERS' THEORY WOULD ELIMINATE JOB SECURITY GUARANTEES AS A SUBJECT OF COLLECTIVE BARGAINING.

Throughout their petition and in their pleadings below, petitioners have professed a desire to protect the integrity of the collective bargaining process by attacking the "permanent" removal of certain topics from the bargaining table. However dressed, their protestations cannot disguise the fact that the only subject removed from the table for any period of time in this case was the ability of the post-1983 pilots to enrich themselves by trading away the job security and compensation guarantees of the pre-1983 pilots.

Ironically, it is petitioners who ultimately seek to limit the scope of permissible bargaining. The inescapable fact is that the *only* way to guarantee job or pay protections is to remove the subject from the bargaining table. Otherwise, the "guarantee" would be an illusion—it could always be bargained away later. Petitioners' theory, if upheld in this case, would preclude an employer from ever guaranteeing job or pay protections under the RLA (and presumably the NLRA). That outcome would change the landscape of collective bargaining in this country and significantly impair the ability of employers and unions to respond to and resolve difficult situations such as those presented in this case.

This case is instructive on all counts. The pre-1983 group sacrificed wages and benefits due them in order to obtain job and pay security. The only way to provide for such security was to guarantee it. The APA knew, however, that eventually pilots like petitioners would come along and try to cash in the promises made in Supplement B in exchange for more money for themselves. Without a ratification mechanism like that included in Supplement B, any job or pay "guarantee" American may have granted would have been illusory. To constitute a "guarantee," the agreement had to be, in some sense, guaranteed; this tautology seems to be lost on petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HARRY A. RISSETTO *
GREGORY S. LEWIS
NEAL D. MOLLEN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Counsel for Respondent
American Airlines, Inc.

* *Counsel of Record*

DATED: September 21, 1993